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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

EGON and SONYA LOEBNER,

PETITIONERS,

v.

FRANCHISE TAX BOARD OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FIRST APPELLATE
DISTRICT, DIVISION FOUR,
CASE A030189 (SF 25067,
CALIFORNIA SUPREME COURT)

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QUESTIONS PRESENTED

This case involves the constitutionalities of four state "statutes" in relation to various clauses of the Fourteenth Amendment.

The first question is whether the first "statute," section 32, article XIII of the California Constitution (a prohibition to interfere with the collection of any tax by any legal means), as applied by the courts below to the second and third California statutes, Code of Civil Procedure section 1060.5 and Revenue and Taxation Code section 19081 (authorizing declaratory relief to determine the petitioners' California "residency" for Personal Income Tax purposes without first paying a tax based solely on alleged "residency"), is consistent with the Due Process clause of the Fourteenth Amendment, as to which

question two California courts of appeal are in conflict.

The second question is whether the California Legislature violated the petitioners' federal right under the Equal Protection Clause when, by promulgating a fourth statute, Section 17014(b) of the Revenue and Taxation Code (a definition of "resident" which, among others, reclassifies to "residents" "non-residents" appointed to their federal office in the Executive Branch by the President of the United States with the advice and consent of the Senate), it established a discriminatory class distinction unrelated to the "minimal state contacts" doctrine.

The third question is whether the California Legislature violated the petitioners' federal right under the Privileges and Immunities Clause when, promulgating the fourth statute (see

Section 17014(b), supra), it abridged their Diplomatic Service Privileges and Immunities, which were granted to them by the President of the United States with the advice and consent of the Senate.

PARTIES

The petitioners are a former Foreign Service Reserve Officer of the United States of America and spouse whc were posted from 1974 to 1976 to the Moscow Embassy. On March 15, 1975, petitioner, Egon Loebner, received the Presidential appointment and U.S. Senate confirmation as Consular Officer and Secretary in the Diplomatic Service of the United States [Appendix M].

The respondent is a legislatively established Administrative Agency of California, empowered to assess and collect taxes under the Personal Income Tax Law of the State, which on May 2, 1980 determined and on February 6, 1981 affirmed that by virtue of the above-mentioned appointment the petitioners were residents of California under a new subsection of a state statute which went into effect in 1974 and which applies

solely to a minute class of Federal Officials and employees.

The attorneys for respondents are John K. Van De Kamp, Attorney General of the State of California, and Patricia Streloff, Deputy Attorney General of the State of California, at 6000 State Building, 350 McAllister Street, San Francisco 94102; telephone (415) 557-2204.

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FRANCHISE TAX BOARD OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION FOUR

The petitioners Egon and Sonya Loebner respectfully request that a Writ of Certiorari be issued to review the judgment and opinion of the California Court of Appeal for the First Appellate District, Division Four, which became final on March 31, 1988.

OPINIONS BELOW

The June 23, 1986 Opinion of the Court of Appeal below [Appendix A] appeared at 183 Cal.App.3d 497, 288 Cal.Rptr. 262 (1986) and appears currently "reprinted without change to permit tracking pending dispositions on review by the California Supreme Court at 193 Cal.App.3d 64 (1987)." It was depublished by order of the California Supreme Court on March 31, 1988 [Appendix E].

The May 2, 1985 conflicting opinion of a California Second Appellate District Court of Appeal in Corbett v. Franchise Tax Board [Appendix J] appeared at 167 Cal.App.3d 808. It was denied review and depublished by order of the California Supreme Court on August 22, 1985 [Appendix I]. Requests for partial publication were twice denied [Appendices K and L].

JURISDICTION

Judgment of the Court of Appeal was entered June 23, 1986. A timely Petition for Review was filed on August 4, 1986 in the California Supreme Court, which granted Petition for Review on September 30, 1986 [Appendix D]. On March 31, 1988, the California Supreme Court dismissed the Review and remanded the cause to the Court of Appeal with instruction not to publish the opinion [Appendix E]. On March 31, 1988, the Court of Appeal issued a remittitur certifying that the June 23, 1986 judgment became final [Appendix C]. On June 20, 1988, Associate Justice of the Supreme Court of the United States, Sandra D. O'Connor, ordered that time for filing a Petition for Writ of Certiorari in this cause be extended to and including July 29, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3)

because two state statutes have been held unconstitutional when it was drawn in question that the Due Process Clause requires that they be constitutional.[1]

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

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1. It is the petitioners' belief that jurisdiction of this Court is also invoked under 28 U.S.C. Section 1257(2) since the courts below upheld a state "statute," section 32 of article XIII of the California Constitution, when it was drawn in question as being repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Section 1 of article III of the California Constitution provides in pertinent part:

> "The State of California is an inseparable part of the United States of America, and the United State Constitution is the supreme law of the land."

Section 3.5 of article III of the California Constitution provides in pertinent part:

> "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power to declare a statute unconstitutional."

Section 14, article VI of the California Constitution provides in pertinent part:

> "The Legislature shall for the prompt publication of such opinions of the Supreme court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person."

> "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

Section 32, article XIII of the California Constitution provides:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Section 1060.5 of the California Code of Civil Procedure provides:

> "Any individual claiming to be a nonresident of the State of California for the purposes of the Personal Income Tax Law may commence an action in the Superior Court in the County of Sacramento, or in the County of Los Angeles, or in the City and County of San Francisco, against the Franchise Tax Board to determine the fact of his residence in this State under the conditions and circumstances set forth in Section 19081 of the Revenue and Taxation Code."

Section 17014 of the Revenue and Taxation Code provides:

> "(a) 'Resident' includes:
> (1) Every individual who is in this state for other than a temporary or transitory purpose.
> (2) Every individual domiciled in

this state who is outside the state for a temporary or transitory purpose.

(b) Any individual (and spouse) who is domiciled in this state shall be considered outside this state for a temporary or transitory purpose while such individual:

(1) Holds an elective office of the government of the United States, or

(2) Is employed on the staff of an elective officer in the legislative branch of the government of the United States as described in paragraph (1), or

(3) Holds an appointive office in the executive branch of the government of the United States (other than the armed forces of the United States or career appointees in the United States Foreign Service) if the appointment to such office was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States.

(c) Any individual who is a resident of this state continues to be a resident even though temporarily absent from the state."

Section 17015 of the Revenue and Taxation Code provides:

"'Nonresident' means every individual other than a resident."

Section 19081 of the Revenue and Taxation Code provides:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state or against any officer of this state to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his alleged residence in this state and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action, on the grounds set forth in his protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles, or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his residence in this state during the year or years set forth in the notice or notices of deficiency assessment. No tax under this part based solely upon the residence of such an individual shall be collected from such individual until 60 days after the action of the State Board of Equalization becomes final and, if he commences an action pursuant to this section, during the pendency of such action, other than by way of or under the jeopardy assessment provisions of this part."

Section 19082 of the Revenue and Taxation Code provides:

"Except as provided in Section 19085, after payment of the tax and denial by the Franchise Tax Board of a claim for refund, any taxpayer claiming that the tax computed and assessed against him under this part is void in whole or in part may bring an action, upon the grounds set forth in his claim for refund, against the Franchise Tax Board for the recovery of the whole or any part of the amount paid."

The 1973 Edition[2] of subdivision (s) of § 47.155/c of the District of Columbia Code provides:[3]

"The word 'resident' means every individual domiciled within the District on the last day of the taxable year, and every other individual who maintains a place of abode within the District for more than seven months of the taxable year, whether domiciled in the District or not. The word 'resident' shall not include any elective officer of the Government of the United States or any employee

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2. In the 1981 Edition this provision was renumbered to the current paragraph (17) of section 47-1801.4.

3. In 1982 this provision was amended to exclude from the word "resident" also "any Justice of the Supreme Court of the United States" unless such "Justices are domiciled within the District at any time during the taxable year." (1986 Suppl.)

on the staff of an elected officer in the legislative branch of the Government of the United States if such employee is a bona fide resident of the State of residence of such elected officer, or any officer of the executive branch of such Government whose appointment to the office held by him was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States, unless such officers are domiciled within the District on the last day of the taxable year."

Rule 29.4 of the California Rules of Court provides, in pertinent part:

"(c) [Dismissal of review] The Supreme Court may dismiss review of a cause as improvidently granted and remand the cause to the Court of Appeal. The order of dismissal and remand shall be sent by the clerk to all parties and to the Court of Appeal. On filing of the order in the Court of Appeal, the decision of the Court of Appeal shall become final and the clerk of the Court of Appeal shall issue a remittitur forthwith."

Rule 976 of the California Rules of Court provides in pertinent part:

"(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

"(b) [Standards for publication of

opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

"(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

"(2) resolves or creates an apparent conflict in the law;

"(3) involves a legal issue of continuing public interest; or

"(4) makes a significant contribution to legal literature by reviewing the either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

"(c) [Publication procedure]

"(1) [Courts of Appeal and appellate departments] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

"(2) [Supreme Court] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

"(d) [Superseded opinions] Unless otherwise ordered by the Supreme Court, no opinion superseded by a

grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part."

Rule 976.1 of the California Rules of Court provides in pertinent part:

"(a) [Partial publication authorized] A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

"(b) [Other rules applicable] For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a published opinion, and the unpublished part as an unpublished opinion."

Rule 977 of the California Rules of Court provides in pertinent part:

"(a) [Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action

or proceeding except as provided in subdivision (b).

"(b) [Exceptions] Such an opinion may be cited or relied on:

"(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel;"

Rule 978 of the California Rules of Court provides:

"(a) [Request procedure; action by a court rendering opinion] A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by letter, with a copy to each party to the action or proceeding not joining therein, stating concisely why the opinion meets one or more of the publication standards. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

"(b) [Action by Supreme Court] When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The

court shall send notice of its action to the transmitting court, each party,and any person who has requested publication.

"(c) [Effect of Supreme Court order for publication] An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion."

JUDGMENT SOUGHT TO BE REVIEWED

The judgment sought to be reviewed is the affirmation of the Court of Appeal of the State of California for the First Appellate District, Division Four [Appendices A, B, and C] of the trial court's judgment of dismissal [Appendix F] which followed the trial court's sustaining of the respondent's demurrer to the petitioners' Complaint for Determination of California Residency [Appendix G] on the grounds that (1) the trialcourt "has no jurisdiction over the subject of the action" and (2) the

Complaint failed to state facts sufficient to constitute cause of action against the respondent.

STATEMENT OF THE CASE

Petitioners were residents of California until December of 1974, at which time they left in order that Mr. Loebner could assume his position as a Foreign Service Reserve Officer of the United States of America at the American Embassy in Moscow, U.S.S.R. "His appointment was for a period of five years, or the needs of the service, whichever period would be less. It was understood that Mr. Loebner would be posted to Moscow for a two- or three-year tour, where he would serve as Chief of the Science Section at the American Embassy. After that, he was to be transferred to other duties,if need be." (Court Record Transcript [CT] at 02.)

"[The petitioners] liquidated their household in Palo Alto and left with all of their minor children for a prolonged and indefinite stay in Moscow, U.S.S.R., which was to be followed by a residence to be yet determined by the State Department, if it had need of Mr. Loebner's services elsewhere. The [petitioners] engaged a real estate agent to look after their residence. They shipped their household effects to Moscow and stored the remainder in a State Department designated location. Mr. Loebner severed his professional connections in California." (CT 02.)

"The [petitioners] established accounts at the American Embassy Community Association and department stores in Finland and Denmark. They changed their mailing address and checking address to Washington, D.C., and transferred their department store and

insurance accounts to the East Coast. The [petitioners] obtained Soviet driver's licenses and diplomatic ID cards. They transferred all their medical and dental records to the State Department. Most of their social contacts were with the American Community in Moscow and the Diplomatic Corps. During the calendar year 1975, the [petitioners] did not vote in California. Neither did they file a resident personal income tax return for that year in the State of California." (CT 03.)

". . . Mr. Loebner informed his superiors in Washington on September 5, 1975 of his intention not to remain for a third year in Moscow." (CT 03.) He subsequently tried to secure several positions outside of California, but "(b)ecause of a confluence of circumstances no suitable openings were

available at that time." (CT 04.) On November 1, 1976, he separated from the Foreign Service Reserve and returned to Palo Alto.

On May 6, 1980, petitioners protested (CT 15) the May 2, 1980 Notice of Deficiency Assessment (CT 13-14) issued by the Franchise Tax Board, claiming that they were not residents under the California Personal Income Tax Law as alleged by the Board. On February 6, 1981, the Board affirmed its residence determination stating: "The taxpayer is held to be a 'resident' for the taxable year [1976] pursuant to section 17014(b) of the Revenue and Taxation Code." [Appendix H].[4]

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4. The Board's determination of petitioners' alleged residence under subdivision (b) of Section 17014 has presumably been occasioned by the petitioners' submission to the Board of a xerographic copy of the document through which President Ford appointed Mr. Loebner a Consular Officer and a Secretary in the Diplomatic Service of the United

Petitioners filed a Notice of Appeal with the California State Board of Equalization on March 6, 1981. After numerous postponements (all requested by the Franchise Tax Board), a hearing was held in May 1983 before the California State Board of Equalization. Presumably because of its counsel's illness, it was only on May 8, 1984 that the State Board of Equalization acted, rejecting the petitioner's appeal from the determination of the Franchise Tax Board.

On July 6, 1984, petitioners filed a Complaint for Determination of Residency against the Franchise Tax Board of California, invoking jurisdiction of the Superior Court of the State of California, in and for the City and

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States of America and authorized and empowered him "to receive and enjoy all the rights, privileges and immunities appertaining" to that appointment. [Appendix M].

County of San Francisco, pursuant to statutory provisions under the Revenue and Taxation Code of California (Section 19081) and the Code of Civil Prccedure of California.

The respondent Franchise Tax Board demurred to the petitioners' complaint on August 27, 1984. The two grounds of the demurrer were that the trial court lacks jurisdiction over the subject of the action and that the petitioners' complaint fails to state facts sufficient to constitute action against the respondent (CT 27-34). The respondent's argument asserted that the two state statutes sections 1060.5 and 19081 were in conflict with section 32 of article XIII of the California Constitution (CT 30-32). The demurrer stated that "the cited statutes purport to allow what the Constitution absolutely forbids: declaratory relief against state tax

assessments" (CT 31; emphasis added). The demurrer relied heavily on Pacific Gas and Electric v. State Bd. of Equal., 27 Cal.3d 277, 165 Cal.Rptr. 122; 611 P.2d 463 (1980) stating that "it has consistently been held that a suit to recover alleged overpayment is the exclusive means of obtaining judicial review of tax proceedings" (CT 30).[5,6,7,8]

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5. By exclusive means demurrer presumably refers to Section 19082 of the California Revenue and Taxation Code.

6. The opinion of the court of appeal below [see Appendix A] also quotes profusely from Pacific Gas & Electric (see 193 Cal.App.3d at 69-70). Just as the demurrer, it underscores (what petitioners consider a mere dictum) the California Supreme Court's remark that section 32 is an "unequivocal constitutional prohibition against prepayment tax litigation."

7. In December 1987, the California Supreme Court significantly modified its above quoted 1980 opinion on dealing with section 32. In Western Oil & Gas Assn. v. State Board of Equalization 44 Cal.3d 208, 213 (1987), referring to the Board's contentions that the relief granted by the trial court is barred by California Constitution, article XIII, section 32, it stated: "We agree

The petitioners opposed the demurrer on several grounds. They stated that section 32 and the two statutes can and should be harmonized, that the Franchise Tax Board was barred by section 3.5 of article III of the California Constitution to declare the two statutes

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that the constitutional provision precludes the prepayment relief sought by the companies in this case, but we reject the Board's contention that the provision bars all prepayment challenges to the Board's authority." (Emphasis in the original.) The importance of this modification was further stressed by the California Supreme Court when on March 31, 1988 it transferred Union Pacific R.R. Co. v. State Bd. of Equalization 192 Cal.App.3d 487 (1-A030006, A031647, A032316, Div 5), after having granted review on August 26, 1987, to Ct.App., 1st Dist 5, with directions to reconsider in light of Western Oil & Gas Assn. v. State Bd. of Equalization, supra. The new opinion, Union Pacific R.R. Co. v. State Bd. of Equalization, 201 Cal.App.3d 647, 655-6 (1988) states in pertinent part "We must determine if section 32 provides an absolute prohibition to judicial interference in the assessment and collection of the tax or if there exists circumstances which permit limited judicial intervention. This question was answered in the recent case of Western Oil & Gas Assn. v. State Board of Equalization, supra, 44 Cal.3d 208. The court indicated that . . . section 32 applies. Nonetheless, limited judicial intervention is permitted

unconstitutional, and that the California Legislature drafted the two statutes to avoid conflict with the United States Constitution.

Unbeknown to the petitioners and the trial court, despite its questioning of

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when the request for information violates provisions of the federal Constitution prohibiting unreasonable searches and services, violations of the right to privacy of the privilege against self-incrimination. (See id., at pp. 213-214.) 'The court's inquiry must necessarily be limited, however, to avoid undue interference with the collection of taxes. . . .'"

8. The enactment of the comparable Tax Injunction Act, 28 U.S.C. § 1341, forbidding the federal courts to entertain suits to enjoin collection of state taxes "where a plain, speedy, and efficient remedy may be had at law or equity in the courts of such State" throws additional light on the proper construction to be given Section 32 of article XIII of the California Constitution. It indicates that Congress intended to make available the injunctive remedy against collection of state taxes under special circumstances where the remedy is neither plain, nor speedy nor efficient. In the case at hand, the remedy has to be judged not plain since conflict between two California courts of last resort has made declaratory relief for residency determination prior to the collection of the disputed state tax uncertain. (See Hillsborough v. Cromwell, 326 U.S. 620 (1946) uncertainty concerning the meaning of the local law.)

the respondent during the September 28, 1984 hearing on demurrer [Appendix N], was the fact that early in August 1984 the respondent had appealed a judgment of a trial court in the County of Los Angeles which held that the two state statutes (Sections 1060.5 and 19081), which the respondent purported to be in conflict with section 32, were constitutional under both the California and United States Constitutions. (For the May 2, 1985 opinion of the Court of Appeal, Second District, Division Three, on Corbett v. Franchise Tax Board, 167 Cal.App.3d 808 (1985), see Appendix J. As indicated by Appendix I, it became depublished on August 22, 1985 in reliance on Section 14, article VI of the California Constitution and rule 976 of the California Rules of Court. Having sustained the demurrer [Appendix G], the trial court below issued a judgment of

dismissal on November 27, 1984 [Appendix F]. Petitioners filed a notice of appeal on December 31, 1984.

Petitioners based their two Appellant's Briefs on the grounds mentioned in the opposition to demurrer (see supra), as well as the Federal grounds which upheld the constitutionality of Corbett v. Franchise Tax Board, 167 Cal.App.3d 808 [Appendix J], which they cited pursuant to Rule 977(b)(1) of the California Rules of Court since it was depublished under Rule 976(c)(2) of said Rules. It became clear during the June 5, 1986 oral argument, in the Court of Appeal below, that the court was not inclined to contemplate decisions and reasoning of a case decertified for publication by order of the California Supreme Court [Appendix I]. As the appended opinion of the court unmistakably shows (193 Cal.App.3d at 73), most

of the petitioners' contentions were not reached by the court. Among these are the Federal questions raised, reasoned, argued, and decided by the Corbett court whose decision is in conflict with that of the court below that petitioners pray a grant of Writ of Certiorari for.

On August 4, 1986, the petitioners filed a Petition for Review in the California Supreme Court to review the June 23, 1986 judgment [Appendix A], which was certified for publication on July 23, 1986 [Appendix B]. On August 4, 1986, the petitioners, pursuant to Rules 978(a) and 976.1 of the California Rules of Court, requested the California Supreme Court to publish in part the depublished Corbett opinion. On September 30, 1986, the California Supreme Court denied the August 4, 1986 (as amended on August 15) letter request to republish in part Corbett

[Appendix K]. On March 23, 1988, pursuant to rule 29.4 of the California Rules of Court, the petitioners filed a motion in the California Supreme Court to advance the case because of Mr. Loebner's newly discovered bone cancer that had a serious adverse prognosis. On March 31, 1988, the California Supreme Court dismissed the review [Appendix E], which it had granted on September 30, 1986 [Appendix D] and the Court's of Appeal June 23, 1986 judgment became final [Appendix C].

On April 29, 1988, the petitioners requested the Supreme Court for a second time to republish in part Corbett and to recall the remittitur of March 31, 1988, in order to remand the petitioners' cause to the court of appeal in light of the to be republished Corbett. This request was denied by the California

Supreme Court on May 25, 1988 [Appendix L].

On June 15, 1988, the petitioners applied to the Supreme Court of the United States for Extension of Time within which to file a Petition for Writ of Certiorari. An order to extend time to and including July 29, 1988 was signed by Associate Justice of the Supreme Court of the United States, Sandra D. O'Connor, on the 20th day of June 1988.

STAGE AND MANNER OF RAISING FEDERAL QUESTIONS BELOW

The above listed Federal Questions were raised at various stages of the proceedings at all three levels of courts below, the Superior Court, Court of Appeal, and Supreme Court of California.

The first Federal Question was raised specifically for the first time in the September 18, 1984 Memorandum in

Opposition to Demurrer to Complaint for Determination of Residency as follows:

> "Giving effect to section 19081 as a whole, to its every word, clause, and sentence so that no part or provision will be useless or meaningless, legislative intent can be gathered from the fact that this section's first sentence has two independent clauses, the first clause consistently interpreted as a full affirmation of the first (allegedly conflicting) constitutional provision that bars legal process interference with the collection of state taxes, and a second clause that should be interpreted as a proviso which details a legislatively mandated residency exception barring the Franchise Tax Board from completing the assessment process, followed by a second sentence which on its face clearly and unchallengeably affirms legislative will and intent of above proviso clause not to collect taxes while plaintiffs' action is pending in court; legislative intent of providing an exception to the provision of the general language containing the main clause of the first sentence can also be gathered from the fact that the above residency proviso has been attached to the above main clause for the likely purpose of avoiding injustice, oppression and potential conflict with the United States Constitution; legislative intent can be further gathered by presuming that the legislature would not enact a code section that is internally inconsis-

> tent but would rather enact one that introduces a special clause that deals expressly with a particular concern so that, in conformity with legislative practice, the special clause can exercise control over the conflicting general and main clause; legislative intent is finally gathered from an interpretation which removes an apparent conflict between section 19081 of the Revenue and Taxation Code and Article XIII, section 32 of the Constitution of the State of California by making the whole of section 19081 valid and operative rather than defeating it or rendering it without effect by a mere literal construction as the attorneys for defendant suggest (Article XIII, section 32 of the California Constitution, Section 19081 of the Revenue and Taxation code)." (Court Record Transcript for [CT] at 37-38.)

Federal question one was raised a second time in the Appellant's Opening Brief (filed December 23, 1985) in the context of reliance on Modern Barber Col. v. Cal. Emp. Stab. Com. 31 Cal.2d 720 (1948). Petitioners alleged that the California Supreme Court erred by depriving the litigant in Modern Barber, supra, of his Fourteenth Amendment

right. This was discussed under the heading of "Compounding of Judicial Error Results in Judicial Error." The petitioners consider the Modern Barber case the cornerstone of a long string of compounded errors leading to their own case. The relevant sentence mentioning the Federal Question is:

> "Not only is the result of the decision tantamount to depriving the appellant in Modern Barber of protection of the XIVth amendment, but it encroaches on the power of the Courts as well." (Appellant's Opening Brief [AOB] at 14:21-24.)

Federal question one was raised again several times in the Appellant's Reply Brief, filed February 6, 1986. Under the heading of "Respondent's authorities do not fall under the purview of the Stare Decisis doctrine," it stated:

> "On at least one occasion the [California] Supreme Court allowed an exception and held that 'the anti-injunction provision of the California Constitution [Cal. Const. at XIII, § 32] must yield to the paramount provisions of the United

States Constitution (Cal. Const., art. III, § 1)...' (Dupuy v. Superior Court 15 Cal.3d 410, 418...)." (Appellant's Reply Brief [ARB] at 28:16-21, also at 30:18-19)

Under the heading "The Corbett Court held that Sections 1060.5 and 19081 are Constitutional and the Supreme Court denied review," is stated:

"Appellants submit that this Court may not find it necessary to follow the path of reasoning hewed out by Corbett (at 819) when it relied on Dupuy v. Superior Court 16 Cal.3d 410, 418 to invoke the 'paramount provisions of the United States Constitution (Cal. Const., Art. III, section 1)' in order to make Art. XIII, section 32 yield on the theory that the legislature was mindful of the due process rights of nonresident taxpayers when it drafted the sections, that have been challenged by the Franchise Tax Board" (AOB 34-44)." (ARB at 35:1-8)

Under the heading "Proposition 1 and Proposition 8, enacted in 1933 and 1974, respectively, contained a joker--namely, 'section 32'" is stated:

"Appellants reassert that Proposition 1 of the 1933 Primary State Election and Proposition 8 of the 1974 General State Election contained a joker that

> tricked voters, unsuspecting the effect of the vastly expanded 'section 32', to vote in favor of propositions that lacked arguments in opposition and that stripped them of due process rights (AOB 34-44)." (ARB at 35:12-17)

In the Petition for Review by the Supreme Court, filed August 4, 1986, Federal question one was raised for the last time as follows:

> "The opinion is unattentive to elementary procedures of construction (citations in 16 Cal Jr 3d (Rev) Part 1, pp. 658-659), strings together out-of-context torn fragments (Opn. pp. 5-7) of this Honorable Court's Pacific Gas and Electric opinion, and fails to seek to harmonize article XIII, section 32 of the California Constitution and the 14th amendment of the U.S. Constitution with the Revenue and Tax Code section 19081 and Code of Civil Procedure section 1060.5)." (Petition for Review [PR] at 7.)

Federal questions two and three were first raised in a general way in the Complaint for Determination of Residency filed July 6, 1984 in Superior Court. On page 6 of the Complaint, the relevant sentence reads:

"This action is brought against the Franchise Tax Board on the grounds that its ruling of February 6, 1981, disallowing in its entirety plaintiff's protest of Deficiency Assessment for calendar year 1976 based on plaintiff's alleged California residency is erroneous, unconstitutional, and without authority of law." (CT at 6:15-19)

This same sentence also appears at Loebner v. Franchise Tax Bd. 193 Cal.App.3d 64, 67 (1987).

Federal questions two and three were raised for the second time in the Petition for Review where it is stated:

"In the present case, review of the Supreme Court is necessary to determine the newly raised, but federally important question of whether section 17014, subdivision (b) is unconstitutional under both California and U.S. Constitutions by violating the provisions of the 14th amendment that guarantees equal protection of laws and non-abridgment of privileges and immunities to federal officers and so that, in view of respondent's admission (Opn. p. 1) [supra 193 Cal.App.3d 64, 67 (1987)] that the appellants' alleged residence is based on the fact that they were in a special category of the federal employees and officers..." (PR at 9)

Under the heading "Appellate Court erred . . .," the following statement appears in the Petition for Review regarding Federal questions two and three:

> "We wish to plead that section 17014(b) of the Revenue and Taxation Code deprives us of our former rights as federal employees not to be transferred from a claimant non-resident under section 17015 to a claimant resident under section 17014(a) for Personal Income Tax purposes. We assert that we are protected from the arbitrary act of the State of California by the 14th amendment of the U.S. Constitution.
> "We propose to amend our original complaint (C.T. pp. 1-26) by alleging that subdivision (b) of section 17014 of the Revenue and Taxation Code, which the respondent's demurrer admits as being the sole basis of its determination of our California residence (Opn. p. 1; C.T. p. 22), is unconstitutional under California Constitution art I, section 7, subdivisions (a) and (b), which provide among others that a person may not be denied equal protection of laws and that a class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens as well as under the 14th amendment of the U.S. Constitution which provides among others that '[n]o State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deny to any person within its jurisdiction the equal protection of the laws.' We submit to this Honorable Court that the above section 17014(b) is unconstitutional because this law, made by the State of California and held against us by the Franchise Tax Board which wishes to enforce it, denies immunities which are provided by section 17015 of the Revenue and Taxation Code to all those federal officials and employees whose federal office or employment is identical with those who are designated as privileged by U.S. Congress under subdivision (s) of section 47.155/c of the 1973 Edition of the District of Columbia Code and because this law denies persons affected by it the protection otherwise provided them by section 17015. A part of section 18001(a) is also unconstitutional because it provides privileges to a class of federal officials and employees designated under section 17014(b), by enabling them to claim tax credits which cannot be claimed by other designees of 17014(b)."
(PR at 25-27)

REASONS FOR GRANTING THE WRIT

I

The first appellate district appeal court's doctrine of absolute, unexceptional and unequivocal prohibition

against prepayment litigation of taxes a) adjudicates personal jurisdiction over a federal Foreign Service Reserve Officer, who served a two-year duty at the American Embassy in Moscow, to the Franchise Tax Board of California, to collect personal income tax, when said adjudication is without a judicial hearing and violates due process, b) expands the limits of that doctrine beyond those set by the California Supreme Court and c) conflicts directly with the decision of the court of appeal of the second appellate district.

"[N]o state shall deprive any person of . . . property without due process of law." United States Constitution. It is self evident that a state's collection of personal income tax deprives persons of property. It therefore cannot be carried out constitutionally without due process of law. The respondent Franchise Tax

Board of California is a state administrative agency created by the California Legislature. It is authorized under the Personal Income Tax Law to collect personal income tax from California residents, but prohibited, under a provision of section 19081 of the Revenue and Taxation Code to collect such tax from persons who claim not to be residents during pendency of court action, instituted by them to have their residence status adjudicated under the provision of section 1060.5 of the California Code of Civil Procedure. (For the text of the above sections 1060.5 and 19081, see pages 6-8 supra.)

In its August 27, 1984 Memorandum of Points and Authorities in Support of Demurrer, the respondent Franchise Tax Board created a logical conundrum out of a fairly straightforward matter and the courts below neither recognized nor saw

through this conundrum. Respondent stated that "the cited statutes purport[9] to allow what the Constitution absolutely[10] forbids: declaratory relief against state tax assessments."

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9. The word "purport" has little evidential value and no legal import, even though during the June 5, 1986 oral argument the court below praised attorney for respondent for its use. "The word 'purporting' means what appears on the face of the instrument. It means the apparent, and not the legal, import. (23 Am. & Eng. Ency. of Law, -2d ed.-527)" McCraney v. Glos, 222 Ill. 628, 631 (1906). "[T]he word 'purport' should be given its usual, ordinary meaning. Webster's New International Dictionary, 2d Ed., defines 'purport' as follows: 'To convey, imply or press outwardly, as one's (esp. a thing's) meaning, intention, or true character; to have the appearance, often specious appearance, of being, intending, claiming, etc. (that which is implied or inferred); ***'" United States v. 30 Cases, Etc., 93 F.Supp. 764, 769 (1950). Neither respondent nor the courts below provided analysis or reasons for the purported conflict between the laws.

10. For the absolute, exclusive and unexceptional requirement of postpayment litigation of taxes, interpretation of section 32, article XIII of the California Constitution, the respondent relied upon dicta in Pacific Gas and Electric Co. v. State Board of Equalization 27 Cal.3d 277 (1980) and State Bd. of Equalization v. Superior

Court Record Transcript at 31 (emphasis added). This "purported" conflict between the two above mentioned statutes and section 32, article XIII of the state constitution was accepted as an indubitable and certain fact by the trial court from the very outset.[11] The petitioners' arguments of the state statute's constitutionality, as mandated by the due process clause, were ignored or called unpersuasive by the courts below, who neither questioned nor examined the state's very right to collect an income tax from a claimant of non-residency before establishing personal jurisdiction of him. The fact that there can be

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Court 39 Cal.3d 633 (1985). Brief of Respondent at 5 and 6. This interpretation has now been superseded by Western Oil & Gas Assn. v. State Bd. of Equalization 44 Cal.3d 208 (1987) stating at 213: "but we reject the Board's contentions that the provision [of section 32] bars all prepayment challenges to the Board's authority." (Emphasis in the original.)

11. See reporter's transcript in Appendix N.

no interference with tax collection if the state has no right to collect the tax remained disguised by a conundrum that the respondent had fabricated. The respondent's insistence that the State Constitution requires tax collection before personal jurisdiction, places the cart before the horse . . . and denies petitioners' due process of law.

It was clearly stated in Woodruff v. Perry 103 Cal 611 and mentioned with approval in Los Animas etc. Land Co. v. Preciado, 167 Cal. 581 (1914) that "[t]here can be no interference, therefore, with the just revenues of this district in enjoining it from collection of the tax against one individual since in no sense has it the right to collect such a tax. . . ." The since depublished Corbett v. Franchise Tax Board 167 Cal.App.3d 808, 818 (1985) [Appendix J] relies on Shaffer v. Carter

252 U.S.37, 52-53 (1920) and Travis v. Yale & Towne Mfg. Co. 252 U.S.60, 68 and 75-76 (1920), among others, for the proposition that "a state is without power to impose an income tax unless it has jurisdiction of the person taxed" and that "[a] statute imposing a personal tax on persons over whom the State has no jurisdiction conflicts with the Fourteenth Amendment and is taking property without due process of law. . . ." In the case before this Court, section 19081 has deprived the Franchise Tax Board of the right to collect a personal income tax from persons who institute and continue action under section 1060.5 Therefore there cannot be interference with the lawful revenue collection of the Board while judicial jurisdictional determination of the petitioners' alleged residency takes place. In fact,

in its decision, the court below adjudicated personal jurisdiction over the petitioners to an administrative agency when neither statute nor constitution do so.

In recent years this Court has examined personal jurisdiction in relationship to due process a number of times. Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694, 713 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-293 (1980); Shaffer v. Heitner, 433 U.S. 186, 216 (1977); Hanson v. Denckla 357 U.S. 235, 251 (1958); International Shoe Co. v. Washington 326 U.S. 310, 316 (1945). It held that under traditional principles, the due process question to be decided is whether "minimum contacts" exist between petitioners and the forum State that would justify the State in exercising personal jurisdiction. This due process

question is to be decided in the present case within the framework of section 17014 of the California Revenue and Taxation Code in accordance with section 19081 of that Code.

The sole reliance of the courts below on Pacific Gas and Electric is misplaced since even that 1980 opinion, whatever it meant, has now been superseded by Western Oil & Gas Assn.[12] (see fn. 10, supra). It is important that this Court decide, whether among the permitted limited judicial interventions (see fn. 12) is

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12. The seriousness of the California Supreme Court's modified construction of section 32 can be gleaned from its very recent (March 31, 1988) transfer of Union Pacific R.R. Co. v. State Bd. of Equalization 192 Cal.App.3d 487 (1987) to Ct.App. 1st Dist., Div. 5, to reconsider in light of Western Oil & Gas Assn. v. State Bd. of Equalization 44 Cal.3d 208 (1987). The reconsidered May 24, 1988 opinion Union Pacific R.R. Co. v. State Bd. of Equalization 201 Cal.App.3d 647, 656 (1988) indeed cites Western Oil & Gas Assn., supra, 44 Cal.3d 208 and states that while "section 32 applies. . . . [n]onetheless limited judicial intervention is permitted. . ."

the statutory authorized declaratory relief for receiving a judicial determination of residency status of Egon E. Loebner who was, for nearly two years, Chief of the Science Section at the American Embassy in Moscow and appointed by President Ford a Consular Officer and a Secretary in the Diplomatic Service of the United States. (See sections 1060.5, 19081 and 17014.)

Besides correcting the unjust and wrong decision of the courts below, it is important that this Honorable Court grant this petition to resolve the Federal question conflict between two California courts of appeal [Appendices A and J] and remove the uncertainty that causes the remedy provided by California to claimants of nonresidency under the

Personal Income Tax Law to be anything but plain.[13]

This uncertainty is further accentuated by orders of the California Supreme Court to depublish[14] both Loebner [Appendix E] and Corbett [Appendix I]. The mystery and dilemma thus created have been described by the Dean of the Santa Clara University

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13. For a discussion of the Federal requirement that a state tax remedy must be plain and not uncertain petitioners rely upon Roswell v. La Salle Nat. Banks 450 U.S. 503, 516-517 (1981).

14. To gain insight into California depublication see Grodin, The Depublication Practice of the California Supreme Court, 72 Calif.L.Rev. 514 (1984). Petitioners also pointed out in their Appellant's Reply Brief at 24 (fn. 11) as follows: "While the Corbett decision adds to the persuasiveness of the appellant's argument, depublication may detract from it. This is so because it is the current practice of the [California] Supreme Court to give no reason for depublication. Fortunately, the Court of Appeal can get some guidance from the following quote: 'Depublication is most frequently used when the court considers the result to be correct, but regards a portion of the reasoning to be wrong and

School of Law in the June 1988 issue of California Lawyer.[15]

Finally, this Honorable Court should grant the writ because no state should extend its jurisdiction beyond the limits set by the due process rights of persons over whom the state claims jurisdiction. This court has been diligent over the years defining these limits. This case adds a new dimension and new twist to this quest. It requires focusing on state efforts to interpret its Constitution in a manner that disguises attempts to expand its

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misleading.' (Grodin . . . 72 California Law Review 514, 522)." Despite the three orders not to publish Corbett [Appendices I, K and L], petitioners continue to believe the result is correct.

15. "A classic example of the mystery that depublication injects into the law is offered by one of the cases depublished by the Lucas court. In 1985, the Bird court depublished a Second District opinion holding that § 19081 of the Revenue and Taxation Code was an exception to the normal constitutional requirement that taxes be

jurisdiction through a claim of lacking jurisdiction. The resolution of this conundrum is simple: jurisdiction over subject matter is different from jurisdiction over a person. The guiding question is: Which has to be adjudicated ahead of the other in order to satisfy due process?

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prepaid before their imposition can be challenged in court. Corbett v. Franchise Tax Bd., 167 CA.3d 808. A year later, a First District opinion declared that the same section of the code, allowing a challenge to a determination of residency, was governed by the constitutional requirement of prepayment. The Bird court granted a hearing, but the Lucas court vacated the grant and depublished the case. Loebner v. Franchise Tax Bd., 184 CA.3d 497; reprinted to permit tracking, 193 CA.3d 64. Thus two contradictory rulings on the same issue were both depublished. How should a lawyer now advise a client on the applicability of § 19081? Worse yet, how would a lawyer even know the issue has recently been decided both ways by different districts of the court of appeal?" Uelmen, The Lucas Court: A First-Year Report Card 8 California Lawyer 30, 31 (June 1988).

II

The State of California Law which transfers certain federal employees from the class of "nonresidents" to the class of "residents" is discriminatory and violates the Equal Protection clause by establishing a class distinction unrelated to the purposes of this law.

The purpose of section 17014 of the California Revenue and Taxation Code is to establish a framework to regulate administrative determination and judicial adjudication of the state's personal jurisdiction to assess and collect personal income tax. The section's subdivision (a)(1) defines "residency" of those individuals who are in the state and subdivision (a)(2) those who are outside the state. Subdivisions (b)(1), (b)(2), and (b)(3) define three categories of federal employees that are to be considered reclassified as

"residents" of type (a)(2), even though they otherwise could be "nonresidents" under section 17015 of this Code. Petitioners have challenged the constitutionality of section 17014(b) in the courts below. They believe that 17014(b)(3) is discriminatory since the distinction made between certain presidential appointees to the executive branch of the United States Government (i.e., those subject to confirmation by the Senate of the United States and whose tenure is at the pleasure of the President of the United States) and other appointees to the executive branch is arbitrary and unrelated to the goals and purposes of California's Personal Income Tax Law. The mode of appointment to the federal office has no relevance or relationship whatsoever to the nature of minimal contacts of that official to the State of California, while that official

holds his or her appointive office. It is the nature of these contacts that decides whether an individual outside the state is a "resident".

Over the years this Court has said that "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Ferguson v. Skrupa, 372 U.S. 726, 732 (1963). The discrimination in section 17014(b)(3) is invidious because it deprives the discriminated persons of property. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the

amendment." Barbier v. Connolly, 113 U.S. 27, 32 (1885). Section 17014(b)(3) is prohibited class legislation because it affects some among similarly situated persons differently from others. Whether appointed to their office by the president or by some other official, appointees to an office in the executive branch of the federal government are similarly situated as to their nexus to the state in which they are domiciled. "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910). The classification in section 17014(b)(3) does not rest upon a

ground that has a fair and substantial relation to the object of the legislation. It rests instead on the classification of a District of Columbia Code unrelated to the object of the California law. Former § 47.1551c, subdiv. (s), now paragraph (17) of section 47-1801.4.

It can be clearly seen from the last paragraph in respondent's affirmation of its determination of petitioners' residency under section 17014(b) [Appendix H] that petitioners were considered members of the discriminated class in legislation prohibited by the Fourteenth Amendment of the United States Constitution. This illegal and unconstitutional determination is the grounds for the litigation now placed before this Honorable Court.

The importance that this Court should attach to this federal question

extends far beyond the injustice created by the California Legislature to the petitioners and similarly situated persons. It reaches into the very heart of federalism since the State of California meddles into the affairs of the federal government. This meddling into the practices of appointments to the executive branch can significantly diminish the number of persons willing to accept such appointments. It can thus have a negative influence on the federal government, diminishing its power to attract the most able, talented and suitable persons into government service. Such inroads by California into the exclusive province of federal government powers could spread to other states and create a problem for the governance of the United States.

In order to set limits on state meddling in federal affairs, this Court should grant this writ.

III

The State of California Law which transfers certain federal employees from the class of "nonresidents" to the class of "residents" abridges the petitioners' privileges and immunities granted them by the President of the United States and violates the Privileges and Immunities Clause of the Fourteenth Amendment.

One of the privileges and immunities, granted by President Gerald R. Ford to petitioner Egon E. Loebner on the occasion of his appointment to Consular Officer and Secretary in the Diplomatic Service of the United States [Appendix M], is the immunity from being taxed by the country of his diplomatic post. This immunity is being abridged

by the State of California in alleging that he is a resident under section 17014(b).[16]

The petitioners' research found no federal cases which expressly address "privileges and immunities of citizens of the United States which no state can abridge" guaranteed by this great country's Constitution to those of its citizens who "share the [federal government's] offices" and "engage in administering its functions." Slaughter-House Cases, 16 Wall. 36, 78-79 (1872) quoting in part Crandall v. Nevada 6 Wallace 36 (1867). The present case involves such privileges and immunities, granted by the authority of

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16. It must be presumed that the respondent Franchise Tax Board of California had determined that Mr. Loebner's position as Foreign Service Reserve Officer did not qualify him for the exemption to being reclassified under section 17014(b)(3) accorded to "career appointees in the United States Foreign Service."

the President of the United States [Appendix M]. These privileges and immunities have been abridged by the California law (Section 17014(b)).

Petitioners respectfully suggest that the present case before this Honorable Court is one of the future cases anticipated 116 years ago by Slaughter-House Cases, supra, at 78-79. At that time, the Supreme Court of the United States stated: "[W]e may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so." Petitioners believe that their case involves immunities of United States citizens who shared in the federal government's offices by virtue of the appointment of Mr. Loebner as Foreign Service Reserve Officer and who

engaged in administering the Diplomatic Service function of the United States.

Even though over a hundred years have passed since Slaughter-House Cases without its anticipated case making an appearance, the current case may be the one that makes it necessary to define more clearly the privileges and immunities of citizens of the United States which no state can abridge.

It is important that this Honorable Court grant this writ in order to establish the limits that state governments can go to when attempting to interfere with the immunities and privileges of officials of the federal government and with the federal government's administrative functions.

CONCLUSION

For these reasons, this petition for certiorari should be granted. Without the petition for grant of certiorari,

the constitutionality of the four above discussed California statutes[17] could remain undecided for a very long time.

Respectfully submitted,

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July 27, 1988

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17. Section 32 of Article XIII of the California Constitution; Section 1060.5 of the Code of Civil Procedure; Sections 17014 and 19081 of the Revenue and Taxation Code.